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ALEXANDER L. STEVAS,

NO. 80-1999

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

162.20 ACRES OF LAND, MORE OR LESS, SITUATED IN CLAY COUNTY, STATE OF MISSISSIPPI, AND F.E. UITHOVEN, G.E. UITHOVEN, CARRIE UITHOVEN, DAVID ASHMORE, PAUL THORNE, AND JAMES L. YOUNG

Petitioners

VERSUS

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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TABLE OF CONTENTS

	PAGE
Table of Authorities.	ii
Argument	1
Certificate of Service	5

TABLE OF AUTHORITIES

PAGE

STATUTES

National Historic Preservation Act, 16 U.S.C. §461 et seq 2,3

Rule 12(F), Federal Rules of Civil Procedure 1,2,3

CASES

Eisen v. Carlisle & Jacquelin, 417 U.S. 56, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974) 1

Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) 1

ARGUMENT

For the first time, the United States implicitly contends in its Brief in Opposition, that the judgment of the District Court is not a final judgment subject to review by this Court. This argument is without merit. The judgment of the District Court was final and subject to review at the time it was entered pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (See Appendix at 34-37). Petitioners' right to appeal has heretofore been unquestioned. The judgment of the District Court disposed of every issue presented and is clearly a final judgment. See Gillespie v. United States Steel Corp., 379 U.S. 148, 85 S.Ct. 308, 13 L.Ed.2d 199 (1964) and Eisen v. Carlisle & Jacquelin, 417 U.S. 56, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974).

The appeal to the Circuit Court con-

cerned only the legal issue of the sufficiency of the defense, within the meaning of Rule 12(F) of the Federal Rules of Civil Procedure, that the United States may not condemn property listed on the National Register of Historic Property without compliance with the National Historic Preservation Act, 16 U.S.C. §461 et seq, (hereinafter NHPA).

The Court of Appeals decided this issue adversely to Petitioners and affirmed the judgment of the District Court. In addition, the Court of Appeals stated that the landowners could litigate any issues relevant to NHPA compliance they wished, but that such issues in no way affected the right of the United States to condemn the property. The Court of Appeals remanded for the limited purpose of allowing Petitioners to litigate NHPA compliance for purposes of possession and injunctive

relief. Therefore, as the case now stands, the United States has the absolute right to condemn National Register property without compliance with NHPA. If this Court declines review, there will be no opportunity in the future to review the legal issue presented by the tendered defense to the taking. That issue simply will not be before the District Court on remand. Future proceedings cannot and will not resolve the controversy between the parties, because they will not deal with the allegedly unlawful divestiture of Petitioners' property. Future proceedings will not affect the posture of the legal issue before this Court, since the issue comes before the Court on a motion to strike filed by the United States pursuant to Rule 12(F) of the Federal Rules of Civil Procedure. Furthermore, under the mandate of the Circuit Court, on remand there will

be no factual development of any issues pertaining to the validity of the taking. In short, the issue before the Court is not only not premature, but review will be forever foreclosed if not afforded at this time. Under these circumstances, we, therefore, respectfully conclude that this case is clearly ripe for review.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I do hereby certify that three (3) copies of the above and foregoing have been mailed, postage prepaid, United States Mail, addressed to counsel of record at his post office address, Mr. Jacques Gelin, Attorney, Appellate Section, Land and Natural Resources Division, United States Department of Justice, Washington, D.C., 20530, and that three (3) copies have been mailed, postage prepaid, United States Mail, to the Solicitor General, Department of Justice, Washington, D.C., 205[illegible], this 15th day of July, 1981.

s/ J. ARTHUR SMITH

J. ARTHUR SMITH, III